Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-33-87
VC GEORGE J
19 MARCH 1992

***Contract** — Sale of shares — Delivery of shares — Time of the essence — Regulation of share transactions — Whether there was valid delivery of shares*

The plaintiff was at all material times a business adviser to a major bank in Malaysia. The defendants were a stockbroking firm operating in Penang. On 7 February 1987, the plaintiff sued the defendants claiming damages for breach of contract. The plaintiff claimed that the defendants had failed to sell 830,000 Sri Hartamas shares ('the shares') as instructed by him and this had caused him loss. The plaintiff gave evidence that on 5 November 1985, he had instructed the defendants' managing director, Hwang, to issue four contract notes in respect of the shares. On each of the contract notes the defendants had made two endorsements. The first was printed to read 'This contract is subject to the Rules of the Kuala Lumpur Stock Exchange' and the other typed in capital letters to read 'LAST DATE FOR DELIVERY 14 November 1985'. The plaintiff had wanted to sell the shares to settle moneys he owed the Standard Chartered Bank in Singapore. He gave evidence that on or about 6 November 1985, Hwang had informed the plaintiff that he had found a buyer for the shares for the price of $2.90 per share. The plaintiff sent 100,000 of the shares to the defendants. In respect of the remaining 730,000 shares, which were pledged to the Standard Chartered Bank in Singapore, the plaintiff gave evidence that he had on 8 November 1985, telephoned the manager of the bank and told her to send the shares to the defendants in Penang. The bank was unable to deliver the shares; neither did they receive payment. The shares were never sold by the defendants and on or about March 1987, the Singapore bank sold the shares at about $1 per share. Hwang denied that the plaintiff had asked him to find buyers for the shares. His testimony was that one David Chua had telephoned him on 5 November 1985 to inform him that a Madam Tan had arranged with the plaintiff for the sale of the shares through the defendants (so that Madam Tan could make use of her margin facility with the defendants) for the price of $2.90 per share.

Held, dismissing the claim:

(1) On the evidence there was no reason why the plaintiff in Kuala Lumpur would seek out the defendants in Penang to find a buyer for his shares. His credibility was more than suspect and the court was satisfied that the plaintiff was not telling the truth when he testified that he had commissioned the defendants to find a buyer

for the shares. The court found as a fact that the transaction had been a married or pre-arranged deal between the plaintiff and Madam Tan.

(2) With respect to contracts for the sale of shares, time was of the essence of the contract both at law and equity.

(3) The position in Malaysia in respect of share transactions was as it was in England, that it was regulated by the rules and regulations and usage of the Stock Exchange unless there was a special agreement between the parties to the contrary. The rules and usage of the Stock Exchange were admissible and relevant to be used in determining the terms and incidence of the contractual relationship existing in a share transaction as came into existence between the plaintiff and the defendants.

(4) It was clear that it was deemed that the contract notes gave notice to anyone reading the notes that the defendants were holding themselves out as being involved in the transaction as brokers and not as principals. The terms of the contract between the plaintiff and the defendants as evidenced by the contract notes was that the delivery had to be effected not later than 14 November 1985 and that time was of the essence. Delivery had to be effected by delivery to the stockbroker of the shares together with the relevant registrable memoranda of transfer. Rule 11(2)(b) of the Rules of the Stock Exchange made it clear that payment for the shares need only be made before 11am on the second market day following a valid delivery and not against delivery. There was not even a proper tender of the shares.

(5) The burden of proving delivery was on the plaintiff. This he had not proved.

[Bahasa Malaysia summary

Plaintif pada semua masa penting adalah penasihat perniagaan kepada sebuah bank utama di Malaysia. Defendan adalah syarikat broker saham beroperasi di Pulau Pinang. Pada 7 Februari 1987, plaintif telah mendakwa defendan menuntut ganti rugi kerana kemungkiran kontrak. Plaintif mendakwa bahawa defendan telah gagal menjual 830,000 saham Sri Hartamas ('saham itu') seperti yang diarahkan oleh beliau dan ini telah menyebabkan kerugian kepadanya. Plaintif memberi keterangan bahawa pada 5 November 1985, beliau telah mengarahkan pengarah urusan defendan, Hwang, untuk mengeluarkan empat nota kontrak berkenaan dengan saham itu. Pada setiap nota kontrak, defendan telah membuat dua pengendorsan. Yang pertama disiarkan dibaca 'Kontrak ini adalah tertakluk kepada Kaedah-Kaedah Bursa Saham Kuala Lumpur' dan yang lain ditaip dalam huruf besar dibaca 'TARIKH TERAKHIR BAGI PENYERAHAN 14 November 1985'. Plaintif hendak menjual saham itu untuk menyelesaikan wang yang beliau berhutang pada Standard Chartered Bank di Singapura. Beliau memberi keterangan bahawa pada atau kira-kira pada 6 November 1985, Hwang telah memberitahu plaintif bahawa

dia telah mendapatkan seorang pembeli bagi saham itu pada harga $2.90 setiap saham. Plaintif telah menghantar 100,000 saham itu kepada defendan. Berkenaan dengan 730,000 saham itu yang tinggal, yang telah disandarkan kepada Standard Chartered Bank di Singapura, plaintif memberi keterangan bahawa beliau telah pada 8 November 1985, menelefon pengurus bank itu dan menyuruhnya menghantar saham itu kepada defendan di Pulau Pinang. Bank itu tidak dapat menyerah saham itu; mereka tidak juga menerima pembayaran. Saham itu tidak pernah dijual oleh defendan dan pada atau kira-kira pada Mac 1987, bank Singapura itu telah menjual saham itu pada kira-kira $1 setiap saham. Hwang menafikan bahawa plaintif telah memintanya mendapatkan pembeli bagi saham itu. Testimoni beliau adalah bahawa satu David Chua telah menelefonnya pada 5 November 1985 memberitahunya bahawa satu Puan Tan telah mengatur dengan plaintif untuk penjualan saham itu melalui defendan (supaya Puan Tan boleh menggunakan kemudahan marginnya dengan defendan) pada harga $2.90 setiap saham.

Diputuskan, menolak tuntutan itu:

(1) Atas keterangan yang ada, tiada sebab mengapa plaintif di Kuala Lumpur hendak mencari defendan di Pulau Pinang untuk mendapatkan seorang pembeli bagi sahamya. Kebolehpercayaan beliau adalah lebih daripada dicurigai dan mahkamah berpuas hati bahawa plaintif tidak bercakap benar apabila dia memberikan keterangan bahawa dia telah menugaskan defendan mendapatkan seorang pembeli bagi saham itu. Mahkamah memutuskan sebagai fakta bahawa transaksi itu adalah suatu urus janji yang telah dikahwinkan atau diatur lebih dahulu antara plaintif dan Puan Tan.

(2) Berkenaan dengan kontrak untuk penjualan saham itu, masa adalah sangat penting bagi kontrak itu dari segi undang-undang dan juga ekuiti.

(3) Kedudukan di Malaysia berkenaan dengan transaksi saham adalah seperti di England, bahawa ia dikawal oleh kaedah-kaedah dan peraturan-peraturan dan penggunaan Bursa Saham melainkan terdapat persetujuan istimewa antara kedua pihak itu sebaliknya. Kaedah-kaedah dan penggunaan Bursa Saham boleh diterima dan relevan untuk digunakan dalam menentukan terma dan insidens hubungan kontraktual yang wujud dalam transaksi saham seperti yang wujud antara plaintif dan defendan.

(4) Adalah jelas bahawa ia dianggap yang nota kontrak itu memberi notis kepada sesiapa yang membaca nota itu bahawa defendan mengemukakan diri mereka terlibat dalam transaksi itu sebagai broker dan bukan sebagai prinsipal. Terma kontrak antara plaintif dan defendan seperti yang dibuktikan oleh nota kontrak ialah bahawa penyerahan itu harus dilaksanakan tidak lewat daripada 14 November 1985 dan bahawa masa adalah sangat penting. Penyerahan harus dilaksanakan dengan penyerahan kepada broker saham bagi saham itu berserta memoranda pemindahan saham yang boleh didaftarkan. Kaedah 11(2)(b) Kaedah-Kaedah Bursa

Saham menjelaskan bahawa pembayaran bagi saham itu hanya dikehendaki dibuat sebelum pukul 11 pagi pada hari pasaran kedua selepas suatu penyerahan yang sah dan bukan terhadap penyerahan. Tidak terdapat pun suatu penyerahan yang sepatutnya bagi saham itu.

(5) Beban untuk membuktikan penyerahan terletak pada plaintif. Ini dia tidak dapat membuktikan.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–177–92.]

Cases referred to

1 *Hare v Nicoll* [1966] 2 QB 130; [1966] 2 WLR 441; [1966] 1 All ER 285 (refd)
2 *Re Schwabacher, Stern v Schwabacher, Koritschoner's Claim* (1908) 98 LT 127 (refd)
3 *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 3 All ER 492; [1989] QB 842; [1989] 3 WLR 723 (refd)
4 *Bond & Securities (Trading) Pty Ltd v Glomey Mines* [1971] 1 NSWLR 879 (refd)
5 *Pollock v Stables* (1848) 12 QB 765; 116 ER 1057 (folld)
6 *Bayley v Wilkins* (1849) 7 CB 886; 137 ER 351 (folld)
7 *Pawle v Read* (1870) 9 SCR (NSW) 103 (folld)
8 *Bowring v Shepherd* (1871) LR 6 QB 309 (folld)
9 *Forget v Baxter* [1900] AC 467 (folld)
10 *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421; [1967] 3 All ER 561 (folld)

Legislation referred to

Securities Industry Act 1973 s 38
Rules of the Stock Exchange, Kuala Lumpur rr 7, 11(2)(b)

R Lazar (*CS Chan* with him) (*Shearn Delamore & Co*) for the plaintiff.
KS Tan (*Chandra Jadadish* with him) (*George Chew Chandra & Associates*) for the defendants.

Cur Adv Vult

VC George J: At all relevant times the plaintiff was what has been impressively described as a business adviser to one of our premier banks, the Standard Chartered Bank, at Kuala Lumpur, as apparently had been his father, before him. Although he was not an officer of the bank and accordingly was not, as he put it, a linebanker, he had been provided with offices in the bank's premises at Kuala Lumpur. On 2 January 1988 he joined the public company, Sri Hartamas Corporation Bhd, as its chief executive officer. The plaintiff's wife was a practising stockbroker in her own right. Clearly at all relevant times the plaintiff grew up in and was and is at the hub of the highest level of commercial activity in the financial and commercial centre of the country, the capital city of Kuala Lumpur.

Either on 5 or 6 November 1985, as a result of one or more telephone conversations between the plaintiff and Mr Hwang Sing Lue (hereinafter referred to as 'Mr Hwang'), the managing director of the defendants, a Penang stockbroking company, four contract notes the subject of this action were issued by the defendant company. They were all received by the plaintiff on 7 November 1985. The contract notes are exhibits in the case as part of the agreed bundle ('AB') and were marked 'AB1' to 'AB4'.

Each of these contract notes is dated 6 November 1985 and purports to be evidence of the sale 'by order and for account of Mr Francis Huang Chang Hsun' (the plaintiff) of the Sri Hartamas shares belonging to the plaintiff in the quantities set out in the relevant box in the contract notes to aggregate 830,000 shares. Some of the other particulars set out in the contract notes show that the selling price of each of the shares was $2.90 and the brokerage commission was 1%. Under the column 'Delivery' were the letters 'RDY' signifying that there was to be 'ready' delivery of the shares. On each of the contract notes the defendants had made two endorsements, the first of which was printed to read 'This contract is subject to the Rules of the Kuala Lumpur Stock Exchange' and the other typed in capital letters to read 'LAST DATE FOR DELIVERY 14 November 1985'.

Some significant portions of the plaintiff's testimony at the trial of this action have to be particularly looked at. He had wanted to sell 830,000 of his Sri Hartamas shares to settle moneys he owed the Standard Chartered Bank in Singapore and had on 6 November 1985 telephoned Mr Hwang at the latter's office in Penang and had asked him to find buyers for the shares at not less than $2.90 per share. According to the plaintiff, Mr Hwang had called him back to say that he had found buyers for the shares and that was followed up with the issue of the four contract notes. Of the 830,000 shares, 100,000 were with the plaintiff and the other 730,000 were pledged to and were with the Standard Chartered Bank in Singapore. The plaintiff had the 100,000 shares that were with him sent to the defendants. It is common ground that they were received with the relevant memoranda of transfer by the defendants at their office in Penang on 13 November 1985 and the plaintiff was credited with the payment for them.

In respect of the other 730,000 shares, the plaintiff's testimony was that he had on 8 November 1985 (ie the day after he had received the contract notes), telephoned the manager of the bank in Singapore and had told her to send the shares to the defendants in Penang. He followed this up by a written confirmation of the instructions which is exh 'PB1'. The plaintiff testified that he had assumed that his instructions (of 8 November) would be carried out, the shares delivered and payment therefor effected and his loan with the Singapore bank settled. No doubt fortified by that assumption the plaintiff, in mid-November, went off with his family on a holiday to Australia. He was away for about two weeks. On his return, in late November, he says that he learnt that the manager of the bank in Singapore had been trying to contact him. He telephoned her and was told that payment had not been received for the shares which she had been trying without success to deliver to the defendants through the Penang branch of the bank. The plaintiff was asked in examination-in-chief whether (as a result of this

information from the manager of the Singapore bank) he had contacted Mr Hwang Sing Lue. His answer to that, surprisingly, was that he had not. However, he went on to testify that in the first week of December Mr Hwang had telephoned him and had told him that because the defendants' facilities with some of its bankers had been suspended as a result of the suspension of the stock market on 3, 4 and 5 December 1985, the defendants were unable to pay for the shares. The plaintiff said that he thought that the defendants wanted more time to pay up. The plaintiff went on to testify that in about the second week of December 1985 Mr Hwang, however, had told him, and the plaintiff testified that Mr Hwang was very firm about it, that the defendants could not pay for the shares. The shares were accordingly then sent back to Singapore by the Penang branch of the bank. Just over a year later, in or about March 1987, the Singapore bank called in the loan and as a forced sale sold off the shares at about $1 per share. The writ herein was caused to be issued about a month earlier on 7 February 1987. By it the plaintiff had sought specific performance of the agreement of sale of the shares; alternatively, damages for breach of contract. As the bank had sold the shares, at the trial the plaintiff restricted his claim to damages and costs.

The plaintiff had testified that he had received the contract notes on 7 November 1985. He agreed with counsel that the contract was subject to the Kuala Lumpur Stock Exchange rules. In cross-examination he conceded that he had known that the shares had to be delivered by 14 November 1985. What he said was, 'Yes, I knew that the shares had to be delivered by 14 November 1985. It says so in the contract notes.' It must be noted that that he had telephoned the Singapore bank on 8 November, the day after he had received the contract notes, and had instructed them to deliver the shares to the defendants in Penang is consistent with such knowledge. There was confirmation that these instructions had been given on the 8th in the plaintiff's letter to the Singapore bank dated 15 November 1985 (exh 'PB1'). However, the Singapore bank does not appear to have done anything about the 8 November instructions till 20 November 1985 when it purportedly sent its letter (exh 'P3') of that date to its Penang branch enclosing with it the 730,000 shares for delivery to the defendants against payment.

There has been no explanation from the bank as to why the shares were not sent in good time to effect delivery before the 'last date' for doing so endorsed on the contract note. When it was suggested that the Singapore bank could not attempt to deliver before 15 November because it was only on that date that the plaintiff had sent the letter PB1 confirming the sale, the plaintiff pointed out that having received the contract notes on the 7th he had telephoned the manager of the Singapore bank on the 8th and had told her of the sale and had instructed her to send the shares to the defendants in Penang. He went on to testify in examination-in-chief, as has been noted, that he assumed that his instructions had been carried out and that he had gone on his holiday. I pause to note that if in fact the plaintiff had given those instructions on 8 November the bank could be said to be guilty of gross negligence in not having carried out the instructions in good time.

The only other witness called by the plaintiff was Mr Chen Lip Hiong who had been in charge of the securities department of the Standard Chartered Bank Penang Branch at the relevant time. His testimony was that he had only received the share scrips and copies of the contract notes and the instructions to deliver them to the defendants on 23 November 1985. He did not (he probably could not) explain why the shares had not been sent to him before what had been stated to be the last date for delivery, ie 14 November. Although he had received the shares on 23 November it was, according to his testimony, only on 25 November that he had telephoned the defendants to inform them of the arrival of the shares. It was only on the 25th that he had received the relevant memoranda of transfer that had been sent to Penang by separate cover. As will be seen later, in the context, delivery of shares without the relevant memoranda of transfer is no delivery.

Now, as has been seen, the plaintiff had testified that it was Mr Hwang who had in the first week in December contacted the plaintiff and, according to the plaintiff, had asked for time to pay up. In the second week, according to the plaintiff, and as had been seen, Mr Hwang had told him and Mr Hwang was 'quite firm' about it, that the defendants could not pay up. In examination-in-chief the plaintiff said that eventually the shares had to be and were sent back to Singapore. He went on to say that he did not make any other arrangements to sell the shares 'because they had already been sold to the defendants'.

In cross-examination when asked whether, when he had realized that the defendants had breached the contract, he had taken steps to mitigate the damage by trying to sell the shares elsewhere, his answer was not what he had said in examination-in-chief that he had not done so because he had sold the shares to the defendants, but that as the market as a whole had dropped because of the Pan Electric crisis (apparently it was that that had resulted in the suspension of the Stock Exchange from 3 to 5 December 1985) he had (as he put it) 'like everybody else' taken a wait and see stand. He went on to say 'I also thought that the defendants would come and make arrangements to take over the shares and pay for them.' This seems somewhat inconsistent with his testimony in chief that Mr Hwang was quite firm in informing him that the defendants could not pay for the shares. A couple of sentences later in the cross-examination he again becomes inconsistent: 'If I had sold the shares I would not have been able at that stage to pay off what I was owing to the bank. I was hoping that the prices would pick up.' Thereupon there was further cross-examination and counsel had suggested that the price of Sri Hartamas shares had not dropped to the extent that the plaintiff wanted the court to think it did. It was put to the plaintiff that 'In December 1985 the average price of Hartamas shares was around $2.55.' Inspite of the plaintiff's reply 'I take your word for it' counsel went on to produce D6, documentary evidence in the form of *The New Straits Times* share movement reports to back up his contention. It was after this that when counsel persisted for an answer to the question why he had not, after his return from Australia in late November, tried to sell the shares elsewhere that the plaintiff said that he had been told by his bankers that Mr Hwang had undertaken to pay for the shares by a bank draft on 3

December 1985. He now gave that as the reason for not trying to sell the shares elsewhere.

On 6 December 1985 the plaintiff received a telegram dated 5 December 1985 from the defendants, exhibited as 'AB5' in the agreed bundle, the contents of which were completely inconsistent with what the plaintiff had testified had been the position obtaining at that stage in respect of the 730,000 shares. The telegram referred to the contract notes and to the agreed sale price of $2,093,713 and went on to state 'We confirmed our consent for you to deliver the abovementioned shares direct to Mr David Chua on behalf of Madam Tan Lee Choo against a payment of $2,093,713.'

The plaintiff's testimony was that he had not sought any such consent and that while he knew David Chua, he was not aware of the arrangements set out in the telegram or of any interest Madam Tan Lee Choo or David Chua had in the transaction. If that were so, particularly in the context of the bank having difficulty in effecting delivery of the shares and the defendants having difficulty in paying for the shares (inter alia, as has been seen, a bank draft for the amount was to have been paid on 3 December 1985 and had not in fact been paid), the contents of the telegram had to be seen as a clumsy attempt on the part of the defendants to avoid its obligations to the plaintiff. However, startlingly, the plaintiff's testimony was that he did nothing about the telegram because he did not 'attach any significance to its contents'. The plaintiff was asked the obvious question:

> Did you instruct the bank or your solicitors or did you yourself inform the defendants that there were no arrangements for delivery direct to the buyer?

His answer:

> I did not inform the defendants myself. But I told the bank to continue to contact the defendants for payments which I understand they did.

There was no evidence that the contents of that telegram of 5 December 1985, receipt of which on 6 December 1985 by the plaintiff was admitted, was ever replied to by the plaintiff or by anybody else on his behalf.

The plaintiff's testimony suggests that he appears to have difficulty in making up his mind as to what he had understood was the position in respect of a number of relevant matters. His answer to the question why he had waited for a year before making his claim on the defendants is in point. His answer: 'It was only by then that it became obvious that the defendants were unable or unwilling to fulfill the contract.' However, some bare 20 minutes or so later in the course of the trial he testified: 'About the middle of December 1985 it became apparent the defendants were either unable or unwilling to complete. I made arrangements with the bank for the shares to be sent back ...'.

In his re-examination the plaintiff went back on what he had testified in respect of the last date for delivery of the shares. He now said that he had not noticed the endorsement of the last date for delivery. It is relevant, in the light of the plaintiff's counsel's submission that will be considered later to note that the plaintiff in re-examination, went on to say that he had not had a discussion with Mr Hwang in respect of the date of delivery and that Mr Hwang had not said he would refuse delivery because it was out of time

A and Mr Hwang had not at any time invoked the rules of the Stock Exchange.

Before moving on, it is relevant to note another curious oddity in the evidence of the plaintiff. The plaintiff had testified that when he first contacted Mr Hwang in respect of the sale of the shares he had not known him. The sale represented by the four contract notes was the only transaction he ever had with the defendant company. The relevant part of the notes of evidence is as follows:

> This was the only transaction I had with the defendant company.
>
> Q How did you come to sell the shares through Hwang & Yusoff in Penang when you were in KL?
>
> A Mr Chong You Hiong who was then the executive director of Sri Hartamas is a friend of mine — when I had the block of shares that I wanted to sell, he asked me to sell through Hwang & Yusoff because he was afraid that as at that time there was a corporate exercise if I sold in the market it could affect the share price — that is why I approached the defendant company. No, at that time I did not know Mr Hwang Sing Lue.

Earlier in his testimony the plaintiff had said:

> The bank in Singapore wanted me to settle my loan, also the stock market had recovered and the price of the Sri Hartamas shares was at a level at which I thought I should sell.
>
> On 6 November 1985 I contacted Mr Hwang Sing Lue of the defendant company. I told him that I wished to sell the shares at not less than $2.90 per share. He came back a little later and said that he had found buyers for the shares at $2.90 and that he would be sending me the contract notes.

The evidence makes no sense. By telling Mr Hwang to find buyers for those shares, in effect the plaintiff was putting the 830,000 in the market. But his explanation for asking a stockbroker in Penang with whom he had had no dealing previously to find buyers for the shares is that he did not want to put it in the market. It may have made some sense if he had added to the instructions that the defendants should find buyers for the shares by private placements and without having them sold on the floor of the stock exchange. But there is no evidence of any such condition imposed. There can be no doubt about it that the plaintiff must have realized that in the circumstances, with such a substantial number of shares to be sold, the defendants would have normally got on to their representatives on the floor of the stock exchange to sell 'at not less than $2.90'.

The other witness called for the plaintiff, Mr Chen Lip Hiong, testified that after all the documents in respect of the sale had reached him on 25 November, he had spoken to one Ms Cheah at the defendants' office and also to Mr Hwang Sing Lue on a number of occasions and on 28 November Mr Hwang had told him that they wanted delivery of the shares against a 'clearing cheque' for the relevant amount which he had told Mr Hwang was not acceptable. The bank, he had told Mr Hwang, wanted the shares delivered against cleared funds. On 30 November, according to Mr Chen, Mr Hwang informed him that the defendants would take up delivery against a bank draft on 3 December. However, on the 3rd 'somebody' from the defendant company told him that the defendants were no longer in a

position to take up the shares. He informed Singapore about this. The shares were eventually sent back to Singapore. A

In the cross-examination of the witness it was highlighted as being odd that although with the share scrips were copies of the four contract notes and although Mr Chen had noticed that the notes were dated 6 November and that there were those letters 'RDY' in respect of delivery which he understood to mean as he put it 'delivery must be effected immediately' and B although he had noticed that when he received the shares some 17 days had passed since 6 November, he had not noticed that endorsement in capital letters on the face of the contract notes that the last date for delivery was stated to be 14 November.

Another aspect of his testimony that was highlighted in cross-examination was that although both Mr Chen and the person dealing with him from C the bank in Singapore appeared to have gone to a lot of pains to ensure that there was a record of everything that transpired between Penang and Singapore — ten telexes were produced — there was no record, not one document to confirm the numerous communications that Mr Chen says he had had with the defendants. The defendants have denied that there D had been any such communication between Mr Chen and Mr Hwang or Ms Cheah.

It is indeed difficult to accept that a bank officer charged with completion of a contract of sale of shares at some $2m would not have directed his mind to the question of whether there was an agreed date for completion E and would not have considered it important to be in a position to prove conclusively with documents that what the bank had to do in respect of the transaction had been duly done or attempted to be done. It is difficult to understand why letters or telexes confirming the telephone conversations that Mr Chen says he had with representatives of the defendants were not sent. It surely should have been clear in Mr Chen's mind that, that the bank F had attempted to deliver and that the defendants had asked for time and had agreed with the bank to pay the amount by a bank draft were all matters proof of which could be crucial in the event of a breach. If not on 25 November certainly by the 26th or 27th it must have been obvious to Mr Chen (if his testimony is to be believed) that the defendants were G prevaricating to say the least. Even if daily letters of confirmation of what was taking place had not been sent, at least after it was clear that the defendants were not going to pay up, one would have thought that a letter placing on record what had transpired would have been sent.

The nearest thing to a documentary confirmation of those crucial telephone conversations that Mr Chen says he had had with the defendants H was his testimony that the defendants had copied to his bank their telegram AB5 to the plaintiff. In purported proof of that he produced P8 which was his telex to the Singapore bank '... we continue to you text of a telex ... addressed to Mr Francis Huang (ie the plaintiff) by [the defendants] which was copied to us'. The telex goes on to quote from the defendants' telegram I addressed to the plaintiff ie AB5. In cross-examination it was put to him that the defendants had never copied that telegram to the bank in Penang and that he must have got a copy of it from the plaintiff (which enabled him to quote from it in his telex to Singapore). Mr Chen insisted that the

A defendants had extended a copy to the bank. However, it has to be noted that the copy of the telegram said to have been extended to the bank in Penang was not produced. The non-production was not explained.

The main witness for the defendants was its managing director, Mr Hwang Sing Lue. His testimony in respect of the transaction between the parties and what had transpired was substantially different from the plaintiff's and Mr Chen's version thereof. He, however, confirmed what is common ground that he hardly knew the plaintiff having met him only once before in November 1985. He had briefly met him at the office of one of his clients, the said David Chua. He also confirmed that which is also common ground that the plaintiff had never been a client of the defendants. According to Mr Hwang another client of the defendants was one Madam Tan Lee Choo who apparently traded actively in stocks and shares using the defendants as her brokers. The said David Chua apparently normally gave instructions to the defendants in respect of transactions on behalf of Madam Tan. Madam Tan enjoyed credit facilities known as margin facilities with the defendants. It was on a 60/40 basis. The facilities were secured by shares pledged to the defendants. In proof of these contentions (which were not challenged by the plaintiff) the margin facilities agreement between Madam Tan and the defendants was produced as was a desk memo dated 12 November 1985 from David Chua to the defendants said to have been sent to the defendants together with the certificates for one million Sri Hartamas shares which, according to the witness, was to secure the margin facility enjoyed by Madam Tan.

Mr Hwang denied that the plaintiff had asked him to look for buyers for the 830,000 Sri Hartamas shares. His testimony was that David Chua had telephoned him on 5 November to inform him that Madam Tan had arranged with the plaintiff for the sale of the 830,000 Sri Hartamas shares to her through the defendants (so that she could utilize the margin facilities) at $2.90 per share. David Chua was told that confirmation of this arrangement had to come from the plaintiff, the vendor. The witness testified that later that day after 4pm the plaintiff rang him up and confirmed the deal: 830,000 Sri Hartamas shares at $2.90 each sold by the plaintiff and purchased by Madam Tan, delivery to be on a ready basis. Apparently the witness told the plaintiff that as it was past 4pm the contract could only pass through on the following day on which date, 6 November, the witness said that the four contract notes AB1 to AB4 were issued and sent to the plaintiff and the corresponding buyer's contract notes (copies produced as D14A to D14D) were sent to Madam Tan. The witness said that on 6 November the defendants also sent a telex to Madam Tan as a record of the transaction, a copy of which was produced as D15. Copies of the relevant pages of the records of daily sales and purchases kept by the defendants were produced to show that those entries of the said sales and of the said corresponding purchases had been made on 6 November.

Mr Hwang testified that the contract notes that were prepared were the standard form of contract notes used by his firm. He further testified that his firm does not use any other form of contract notes. He also testified that his firm did not take position; in other words, they did not speculate in shares themselves. According to him, all share transactions by them were as

brokers. It was suggested to him that if in fact they had been acting as brokers the format of the contract notes would have stated that. Mr Hwang explained how stockbroking transactions were carried out. According to him, in stockbroking there has to be a buyer as well as a seller. The stockbroker can act, as his firm did here, as agent for both the seller as well as the buyer. When his buying client buys, his account is debited with the purchase price. The selling client is issued with a credit note for the sale price. When the selling client delivers his shares to the stockbroking firm, they will debit his account for the amount and thereby square off his account. Mr Hwang also pointed out that in stockbroking it is customary not to disclose the name of the buyer to the seller and vice versa which he explained in cross-examination was why there was no provision for the buyer's name to be disclosed in the contract notes issued to the seller and the seller's in the contract notes issued to the buyer. This explanation was in answer to the suggestion in cross-examination that the omission to name the other party in the contract notes was because the deal was not a married deal, ie one entered between the buyer and the seller inter se but put through a stockbroker. Mr Hwang had also given an explanation as to why the plaintiff from Kuala Lumpur should use his firm in Penang for the transaction: it being a pre-arranged deal between the plaintiff as seller and Madam Tan the buyer and it being at that time a buyers' market, the buyer (in Penang) could, according to Mr Hwang, dictate terms 'either you go through Hwang & Yusoff or no deal'. Mr Hwang explained that the benefit that Madam Tan obtained from insisting that the deal be done through the defendants was that she could utilize the margin facility she enjoyed with them and would pay only 1% instead of 2% by way of brokerage.

No doubt the seller could use his own stockbrokers if he wanted to, but in that event he would have had to pay brokerage to them and the buyer would have to pay the full 2% to her brokers. If, however, the seller joins the buyer in using a common stockbroker the 2% brokerage would be split between buyer and seller so that each would pay only 1%. It is relevant to note that 1% of $2m is $20,000 — not by any standards a bagatelle!

I could find on the evidence no earthly reason for the plaintiff in Kuala Lumpur to seek out the defendants in Penang to find buyers for his shares. As has been seen his purported explanation for doing so was an exercise of contradiction in terms and amounted to no explanation. I was and am satisfied that the credibility of the plaintiff was more than suspect and in particular I am more than satisfied that the plaintiff was not telling the truth when he testified that he had commissioned the defendants to find buyers for his shares. Although neither David Chua nor Madam Tan were called, the documentary evidence produced taken with the evidence of Mr Hwang overwhelmingly (in any event certainly on a balance of probability), point to, and I find as a fact that, the transaction in respect of the 830,000 shares had been a married or pre-arranged deal between the plaintiff and Madam Tan agreed between them to be put through the defendants for obvious reasons, namely, that Madam Tan could utilize the margin facilities agreement she had with the defendants with Madam Tan no doubt insisting on both parties using the defendants as the brokers so that she need pay only 1% by way of brokerage, the other 1% to be paid by the plaintiff.

In England it would appear to be settled law that 'the time for completion of bargains upon the Stock Exchange, London is, in the absence of special agreement, fixed by the Rules and Regulations of The Stock Exchange' — see 36 *Halsbury's Laws of England* (3rd Ed) para 848. Paragraph 849 thereafter goes on to state: 'Time is of the essence of a contract for the purchase and sale of securities and, if completion does not take place within the proper time, the purchaser may refuse to accept'.

In the English Court of Appeal decision *Hare v Nicoll*,[1] Willmer LJ, in dealing with the issue of whether time is of the essence in respect of a contract for the sale of shares, said at p 142:

> In *Roberts v Berry* 3 De GM & G 284, Turner LJ is reported as saying [at p 291]:
>
> > 'Time may be made to be of the essence of a contract by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time.'
>
> In the present case it seems to me that both the nature of the property and the surrounding circumstances call for consideration. As to the nature of the property, the subject matter of the option consisted of shares of a highly speculative nature, liable to considerable fluctuation in value. Even without the assistance of authority, I should have been disposed to say that that of itself was a reason for holding that time was of the essence of the contract. Mr Hirst has, however, drawn our attention to three cases in which it has actually been held that the speculative nature of shares, the subject of an option, was a reason for holding time to be of the essence. I refer to *Doloret v Rothschild* (1824) 1 Sim & St 590, *Rothschild v Hennings* (1829) 9 B & C 470, and *Re Schwabacher, Stern v Schwabacher, Koritschoner's Claim* (1908) 98 LT 127.

Further down at p 143 a passage from *Re Schwabacher*[2] was referred to:

> In *Re Schwabacher* (1908) 98 LT 127, for instance, the decision was put on quite general grounds. Parker J is there reported as saying [at p 129]:
>
> > 'With regard to contracts for the sale of shares, I think that time is of the essence of the contract both at law and in equity. Shares continually vary in price from day to day, and that is precisely why courts of equity have considered such a contract to be one in which time is of the essence of the contract, and not like a contract for the sale and purchase of real estate, in which time is not of the essence of the contract.'

Hare v Nicoll[1] and the said cases referred to in that judgment were followed more recently by the English Court of Appeal in *British and Commonwealth Holdings plc v Quadrex Holdings Inc*[3] where Sir Nicolas Browne-Wilkinson VC said at p 504:

> In equity, time is not normally of the essence of a contractual term. The rules of equity now prevail over the old common law rule: see the Law of Property Act 1925, s 41. However, in three types of cases time is of the essence in equity: first, where the contract expressly so stipulates; second, where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence; third, where a valid notice to complete has been given. In the present case there was no express stipulation that time was of the essence. The subject matter of the sale (shares in unquoted private companies trading in

a very volatile sector) is such that if a date for completion had been specified, in my judgment time would undoubtedly have been of the essence of completion: see *Re Schwabacher, Koritschoner's Claim* (1908) 98 LT 127 and *Hare v Nicoll* [1966] 1 All ER 285, [1966] 2 QB 130.

In the introduction to 37 *Court Forms* (2nd Ed) under 'Stock Exchange: Practice', the position that obtains in one relevant aspect of stock exchange transactions is succinctly set out:

> A person who employs a member of a Stock Exchange as a broker to do business for him on that Exchange will be held, unless the contrary be expressly shown, to have employed him, and authorized him to act, in accordance with the published rules and regulations of the Exchange, whether he knew of them or not (g).

The footnote (g) is as follows:

> See 36 *Halsbury's Laws* (3rd Ed) 511, Text and note (r), and *Bowring v Shepherd* (1871) LR 6 QB 309. Express notice that a transaction is subject to the Rules and Regulations of the Stock Exchange is given on the contract note transmitted by the broker to his client. Every bargain on the Stock Exchange must be fulfilled according to the Rules, Regulations and usages of the Stock Exchange: Rules and Regulations of the Stock Exchange, London, r 73.

The Kuala Lumpur Stock Exchange, although incorporated under the Companies Act 1965 as a company limited by guarantee, is in effect a creature of statute — see the Securities Industry Act 1973 and 1983, the preamble of the latter stating:

> An Act to make provisions with respect to stock exchanges, stock brokers and other persons dealing in securities, and for certain offences relating to trading in securities, and for other purposes connected therewith.

The Act has some 134 sections and goes into some great detail in making provisions to meet the objectives of the Act as set out in the said preamble.

I pause to note that s 38 of the Act which deals with the issue of contract notes provides in sub-s (2)(b) that 'A contract note given by a dealer under sub-section (1) shall include — where the dealer is dealing as principal with a person who is not the holder of a dealer's licence a statement that he is so acting.'

In my judgment there can be no doubt whatsoever that the position here in respect of share transactions, as it is in England, is that it is as regulated by the rules and regulations and usage of the Stock Exchange (the London in England and the Kuala Lumpur here) unless there is a special agreement between the parties to the contrary.

In *Bond & Securities (Trading) Pty Ltd v Glomey Mines*,[4] reference was made to the line of authorities that establishes that the rules and usage of the Stock Exchange are admissible and relevant to be used in determining the terms and incidence of the contractual relationship existing in a share transaction as it came into existence between the plaintiff and the defendants. The cases referred to are: *Pollock v Stables*[5] at pp 774–775; *Bayley v Wilkins*[6] at p 902; *Pawle v Read*[7] at pp 112–113; *Bowring v Shepherd*[8] at p 327; *Forget v Baxter*[9] at p 470; Ungoed-Thomson J in *Cunliffe-Owen v*

A *Teather & Greenwood*[10] at pp 1441–1442. In my judgment the ratio of those cases has application in our jurisdiction.

It is accordingly relevant to look at some of the rules made by the Stock Exchange for regulating transactions in respect of shares. Rule 7 deals with delivery. Valid delivery in respect of a ready contract is to be effected by
B delivery on any market day (which is defined as being between 10am and 4pm from Mondays to Fridays (other than 'market holidays — also defined') but not later than the prescribed time on the prescribed day of the prescribed week, of valid certificates and registrable transfers duly executed and stamped.

By a press release dated 29 December 1983 the Stock Exchange pur-
C ported to improve on the rules, and in respect of delivery provided that in respect of 'Ready Bargains/Contract', inter alia:

> Delivery must be made by 3pm on any market day or the prescribed day (see Table I col B) within the next trading period.
>
> The new Ready Bargain Rule has the following features:
>
> D ...
>
> (3) All stock and shares done between a Monday and a Friday of a trading period shall be delivered on any market day but not later than 3pm on —
>
> (a) Wednesday of the week following the trading period in respect of selling clients *to their brokers*. (Emphasis provided.)

E Further down in the press release in another context but in respect of delivery in ready contracts it is provided that: 'Clients will have between three to seven (3 to 7) market days to deliver their securities *to brokers* ...' (emphasis provided). Clearly the delivery has to be made *to the brokers*.

Rule 11(2)(b) provides in respect of payment to the selling client that:

F > Payment to seller shall be after delivery of securities such as constitute valid delivery or deliveries between Member firms and Member companies as provided in Rule 7. Except in the case of bearer securities, shares tendered before 12.30 p.m. on any ordinary market day shall be paid for before 11.00 am. on the second (2nd) market day following.

The 830,000 shares were not bearer securities.

G The contract notes admittedly received by the plaintiff on 7 November 1985 have been looked at earlier in this judgment. Additional to what has been observed, it has to be noted that none of them state that the dealer is dealing as principal. It seems clear, having the said s 38 in mind, that it is to be deemed that the contract notes give notice to anyone reading the
H notes that the defendants were holding themselves out as being involved in the transaction as brokers and not as principals.

It follows that, that the plaintiff did not have a discussion with Mr Hwang in respect of the date of delivery, that Mr Hwang had not said that he would refuse delivery and that he had not expressly invoked the Rules of the Stock Exchange are of no consequence vis-a-vis the terms of
I the contract between the parties.

It is clear and I hold that the terms of the contract between the plaintiff and the defendants as evidenced by the contract notes were that delivery had to be effected not later than 14 November 1985 and that time was of

the essence. Delivery had to be effected by delivery to the stockbroker of the shares together with the relevant registrable memoranda of transfer. Rule 11(2)(b) makes it clear and I hold that payment for the shares need only be made before 11am on the second market day following a valid delivery and not against delivery.

In the instant case admittedly there had not been any delivery of the shares not before and not even after 14 November 1985. Chen was asked, 'Did you or anybody else from your bank attempt to deliver the 730,000 Sri Hartamas shares or any of them at the premises of the defendant company?' His answer was, 'No'. In my judgment there was not even a proper tender of the shares after the shares eventually reached Mr Chen. Even if one believes everything said by Mr Chen there was no proper tender. Chen said:

> I called them up on 25 November 1985. I spoke to one Miss Cheah. I told her that the documents had arrived and the amount that had to be paid on delivery. I told her that we wanted payment by cleared funds ie not a cheque for clearance. If it is a cheque it must be cleared before delivery to us. ... I did speak to Mr Hwang on 28 November 1985. He said he would let us have a clearing cheque he wanted delivery of the scrips against that.
>
> I told him that that was not acceptable. We could only deliver it against cleared funds.

Chen at that stage was not making a tender. He was, as it were, trying to enter into a special agreement contrary to the terms already deemed to have been agreed to by the parties.

The burden of proving delivery is on the plaintiff. He himself had nothing to do with the delivery. He had to rely entirely on Mr Chen to establish this. Chen did not attempt to prove delivery because, as has been seen, there had been no delivery.

In the face of r 11 Chen was in no position to insist on being paid against delivery. In the face of there being a last date for delivery specified in the contract notes and time being of the essence there can be no doubt that if he had between the 25th and the 28th, or even later, talked to Mr Hwang as he claimed he had done, he would have been told that he was well out of time. If he had insisted on payment against delivery, Mr Hwang would have surely thrown r 11 at his teeth.

Counsel for the plaintiff submitted that I should accept Chen's evidence as against that of Hwang and Ms Cheah because of contemporaneous documents and the submission that Chen had no reason to lie. Inter alia, Chen not having ensured that there was documentary proof of the alleged agreement to accept delivery out of time is reason enough for him to lie. Another reason for him to lie would be the need to neutralize what could be said to be negligence on the part of the bank in not having effected delivery by the 14th, having in mind that the plaintiff had given them instructions as early as the 8th to deliver. As to the so-called contemporaneous documents, the absence of any record of what happened between Chen and the defendants make me more than a little suspicious of the veracity, the bona fides of those documents. One has to be pretty naive to think that it is not possible to create pre-dated telexes, particularly if the sender and the recipient are on the same side of the fence.

About the only flaw in the version of the defendants were certain erroneous entries made into the margin account of Madam Tan debiting her with the price of the 730,000 shares thereby suggesting that delivery had been effected. Since it is common ground that delivery was never effected and since even going by Chen's evidence, tender (on his terms) was refused, there can be no doubt that the entry was erroneously made as was indeed testified to by the person who had made the entries. She testified that on 2 or 3 December 1985, as soon as her supervisor noticed those entries in the November 1985 statement of Madam Tan, he had instructed her to rectify the error and that such rectification was thereupon effected.

It is also relevant to note that the closing prices of Sri Hartamas shares as per exh D6 show that from $2.90 on the 13th, the 14th and the 15th it went up to $3 on the 16th and kept at about $3 until it shot up to $3.20 on the 23rd. On the 27th and the 28th, on which dates Chen had said he had been offering to deliver, it was $3.06 and $3 respectively. The crisis of 3, 4 and 5 December was still a week away and the alleged suspension of the defendants' banking facilities, that for the plaintiff was suggested as the reason for the defendants not paying up, had as yet not taken place.

It seems the probabilities are that if Chen had offered to deliver after 23 November and before the 29th, at $2.90 the defendants would have probably grabbed at the chance. On the basis of the closing prices on 27 November at $3.06 they would have been up by some $116,800 in respect of the 730,000 shares. On the 28th at $3 they would have been up by $73,000!

I find the evidence of Mr Hwang and Ms Cheah more probable than Mr Chen's version of what happened. I find as a fact, on the balance of probabilities, that PW2 Chen never had any communication with either Mr Hwang or Ms Cheah. With that finding the whole substratum of the plaintiff's case that there was tender which was not rejected, that there was waiver, and reliance on estoppel, collapses.

The totality of the evidence suggests to me clearly that this claim was a try-on by the plaintiff aided and abetted by a comparatively junior member of the staff of the Penang branch of the bank. At stake was more than a million ringgit which with interest would be double that amount. But it is a try-on that failed.

The plaintiff's claim is dismissed with costs. The exhibits will be returned to the solicitors for the parties after the period for filing notice of appeal has expired.

Claim dismissed.

Reported by Mathavan Devadas